

On November 27, 2012, the Board affirmed the ALJ's findings regarding claimant's 15% functional impairment and 24% task loss. The Board remanded the case to the ALJ with directions to reopen the record regarding claimant's wage loss and to take additional evidence. Upon receipt of the additional evidence, the ALJ was to determine what portion of a foster care stipend claimant used for his personal benefit and to calculate claimant's post-injury wage loss.

On remand, the ALJ found:

The only additional evidence taken after this remand by the Workers Compensation Board was the deposition of the Claimant taken on December 2, 2013. The Court has reviewed the testimony of the Claimant, and finds that it is not possible to determine which amount of the non-income stipend from Youthville could be called income, and therefore finds that the Claimant has sustained his burden in proving that his post-award income is zero.

Respondent requests review of whether claimant's stipend for caring for foster children is a post-injury wage, and if so, what is the nature and extent of claimant's disability? Respondent argues claimant uses a significant portion of the foster care stipend for his own benefit and he should only be entitled to his 15% functional impairment.

Claimant argues the ALJ's Award should be affirmed. He contends the entire foster care stipend is not wages according to child services, the IRS and K.S.A. 44-511. However, the Board already determined claimant had post-injury earnings and instructed the ALJ to determine how much of the foster parenting money constituted claimant's post-injury wages.

The issues for Board determination are:

1. What is claimant's post-injury average weekly wage?
2. What is claimant's wage loss and his resulting work disability?

FINDINGS OF FACT

The Board incorporates the factual findings and any legal conclusions from our November 27, 2012 Order that are not inconsistent with this Order. Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

At the October 17, 2011 regular hearing, claimant testified he started caring for foster children about one year earlier. At the time of the hearing, claimant took care of two foster children. He testified Youthville Foster Homes provided him a check for about \$1,200 every two weeks or \$2,400 every month. He could use the money as he saw fit, as long as the foster children's needs were addressed. Claimant testified money from foster care is his only source of income.¹ Claimant further denied the money from Youthville was his income, but was rather "income for me to take care of these kids."² His non-taxable stipend in 2011 from Youthville was \$41,814.

¹ See R.H. Trans. at 26. See also *id.* at 28.

² *Id.* at 32.

At an October 15, 2013 hearing, claimant submitted a list of expenses for him and his foster children, such as rent, clothing, food, utilities, personal hygiene, school activities, dining out and paying a babysitter. Claimant pays these bills with his foster care stipend.

On December 2, 2013, claimant testified the amount of his 2011 stipend likely increased in 2012 and 2013. Claimant testified he used the stipend to pay for some clothes for himself, such as socks and underwear, as well as some shirts. Claimant used the stipend to pay for his three bedroom rental house, which was \$625 per month, but was up to \$675 per month by the time of his October 15, 2013 testimony. Claimant paid \$600 to \$800 per month in utilities (such as water, electricity, gas, trash) with money from his stipend. Claimant paid about \$60 per month for renter's insurance. Claimant used the stipend from Youthville to pay \$1,300 to repair a room that a foster child damaged.

Youthville money paid for claimant's personal vehicle – a \$3,000 truck he bought in November or December 2012 – as well as gasoline (about \$320 per month) and vehicle liability insurance. Claimant estimated about 70% of his travel involves the foster children.

The dining out budget is generally for the foster children,³ but they do not always go out to eat with claimant or he and his girlfriend.⁴ Claimant has about \$130 in monthly expenses for babysitters so he and his girlfriend could go out on dates without the foster children. Money for such activities would come from claimant's Youthville stipend. Claimant used about \$400 from Youthville to pay for part of a trip he took with his girlfriend to Puerto Rico.

Claimant owes child support, but the record does not explain if he is paying his child support or if any payments might be out of the money from Youthville.

Claimant is licensed for up to four foster children, but usually does not have more than two foster children, and only had one foster child at the time of his December 2, 2013 testimony. Claimant had two foster children at the October 15, 2013 hearing. He testified, "I've always had two. I've had more but mainly two."⁵

Claimant testified that he estimates he saves about \$300 or \$350 per month from the money from Youthville to spend as he sees fit for himself, but he sometimes uses such money for the foster children.

³ See Dec. 2, 2013 Evidentiary Depo. at 11-12.

⁴ See *Id.* at 23.

⁵ October 15, 2013 Hrg. Trans. at 11. However, at his December 2, 2013 deposition, claimant testified that from April 2010 to April 2012, he would say he was clothing three foster children. (See December 2, 2013 Depo. at 22.). The Board cannot ascertain if claimant meant he was caring for three foster children or he had additional clothing expenses because one of the foster children destroyed his shoes and clothes.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-511, which concerns determining a claimant's average weekly wage, is limited to calculating wages at the time of a worker's accident, not necessarily to compute a claimant's post-injury average weekly wage.⁶ Economic gain may be included in determining a claimant's average weekly wage.⁷ In this case, the foster care stipend results in an economic gain to claimant.

The evidence establishes claimant, on average, would care for two foster children. Based on claimant's testimony and Exhibit 1 from the October 15, 2013 hearing, the table below represents claimant's monthly expenses, with some of the expenses only for the children and some of the expenses apportioned between claimant and the children.

Bills/Expenses	Amount	Claimant	Child #1	Child #2
Rent and renter's insurance	\$735	\$245	\$245	\$245
Clothing	\$250		\$125	\$125
Food	\$400	\$134	\$133	\$133
Utilities	\$700*	\$233	\$233.50	\$233.50
Hygiene, haircuts	\$100		\$50	\$50
School activities	\$100		\$50	\$50
Dining out	\$225*	\$75	\$75	\$75
Babysitter	\$130		\$65	\$65
Gasoline	\$320	\$107	\$106.50	\$106.50
Totals	\$2,960	\$794	\$1,083	\$1,083

* These figures are averaged from the low and high estimates provided by claimant.

The above chart does not account for all expenses. For instance, claimant incurred a \$1,300 expense when a foster child damaged his room. Such repair was paid for with Youthville money. Also, the chart does not account for the \$3,000 of Youthville money claimant used to buy his truck. He benefits from the truck, but so do the foster children.

⁶ *Nistler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 839, 196 P.3d 395 (2008).

⁷ See *Ridgway v. Board of Ford County Comm'rs*, 12 Kan.App.2d 441, 748 P.2d 891 (1987), rev. denied 242 Kan. 903 (1988).

While claimant testified he receives a \$2,400 stipend from Youthville each month, the Board does not put much credence in such figure, as he would have a loss of \$560 each month if his monthly expenses averaged \$2,960. Multiplying \$2,400 a month for 12 months results in \$28,800. This figure varies significantly from the better evidence – documentation from Youthville showing claimant's 2011 stipend was \$41,814, as well as claimant's testimony that such figure likely increased in 2012 and 2013.⁸

Respondent argues 50% of the money from Youthville should be attributed to claimant as his post-injury wage. However, respondent provided no explanation as to the basis for such calculation. As a matter of equity, the Board concludes two-thirds of the stipend from Youthville is incurred for the benefit of the foster children, while one-third of the money is used by claimant. Two foster children occupy two of claimant's three bedrooms. Two foster children represent two of the three people living off the stipend provided by Youthville. Our methodology is not a precise calculation, but represents an attempt to ascertain claimant's average post-injury average weekly wage.

The most credible evidence shows claimant received \$41,814 from Youthville on a yearly basis. Dividing such figure by 52 weeks results in an average weekly stipend of \$804.11. Attributing two-thirds of the \$804.11 figure to the care of the foster children and the remaining one-third as being to claimant's economic benefit results in claimant having a post-injury average weekly wage of \$268.01. Comparing such figure to claimant's pre-injury average weekly wage of \$371.83 results in a 28% wage loss.

The Board could remand this matter to the ALJ to determine claimant's work disability, but will address such issue as a matter of judicial economy. Based on K.S.A. 44-510e (Furse 2000), work disability is based on averaging task loss and wage loss. The Board concludes claimant has a 26% work disability based on averaging a 28% wage loss and a 24% task loss.

CONCLUSIONS OF LAW

The ALJ's Award is reversed. Claimant has post-injury earnings of \$268.01 per week and a 26% work disability based on a 28% wage loss and a 24% task loss.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

⁸ The Board can get close to the \$41,814 figure by calculating yearly expenses of \$35,520 and adding \$4,200, the high end of what claimant testified would be his remaining yearly disposable funds.

⁹ K.S.A. 2009 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ John Clark dated January 17, 2014, is reversed.

As of August 6, 2014 there would be due and owing to claimant 36.86 weeks of temporary total disability compensation at the rate of \$247.90 per week in the sum of \$9,137.59 plus 102.22 weeks of permanent partial disability compensation at the rate of \$247.90 per week in the sum of \$25,340.34 for a total due and owing of \$34,477.93, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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